Supreme Court, U.S.
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07-_____

In the

SUPREME COURT OF THE UNITED STATES

Denny R. Patridge

Petitioner,

v.

UNITED STATES

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for
the Seventh Circuit

WRIT OF CERTIORARI

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QUESTIONS PRESENTED

i. In a Federal Criminal Tax Case where an element of the alleged crime is that the Government must prove Petitioner acted with specific intent to violate the law, termed as to have acted "willfully," is the United States required to prove beyond a reasonable doubt, and does the jury have to find, that the person charged was "aware of the specific provision of the tax code he is accused of violating" as confronted by this Court in *Cheek v. U.S.*, 498 U.S. 192, 201 (1991), to the Seventh Circuit, and expanded in *Ratzlaf v. U.S.*, 510 U.S. 135, 149 (1994), and clarified *in Bryan v. U.S.*, 524 U.S. 284, 194 (1998)?

ii. Since tax forms are "typical information collection requests", see *Dole v. United Steelworkers*, 494 U.S. 26 (1990) and because they are "inexorably" linked to the payment of taxes, when a request fails to "comply" with the Paperwork Reduction Act of 1995, specifically with 44 U.S.C. §§§ 3506(c)(1)(B), 3507 and 3512(a), should Petitioner have been granted relief from being subject to penalty under 26 U.S.C. § 7201, and if not, how does section 7201 withstand 44 U.S.C. § 3512(a)(1995)?

iii. Is it a violation of the 6th Amendment confrontation clause and 5th Amendment right to due process for the District Court Judge, who personally triggered a criminal investigation of a key witness for the defense, to sit in judgment

of the trial of Petitioner and to determine the 5th amendment rights of Petitioner's witness without disclosing the District Court Judge's involvement in the prosecution of Petitioner's witness?

iv. Should the District Court have granted Petitioner's request to dismiss the superceding indictment based upon rule of lenity?

v. Was it a reasonable exercise of discretion for the District Court to use a whipsawed "tax loss" to determine the "guideline range" for sentencing Petitioner to the Maximum?

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ii. Tax forms are "typical information collection requests", this Court said in *Dole v. United Steelworkers*, 494 U.S. 26, 32 (1990) and because they are "inexorably" linked to the payment of taxes, when a request fails to

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PETITION FOR WRIT OF CERTIORARI

Denny R. Patridge respectfully requests a Writ of Certiorari be issued to the U.S. Court of Appeals for the Seventh Circuit regarding its decision to ignore this Courts decisions in *Cheek v. U.S.*, 498 U.S. 192, 201 (1991), issued to the Seventh Circuit, as expanded in *Ratzlaf v. U.S.*, 510 U.S. 135, 149 (1994), and clarified *in Bryan v. U.S.*, 524 U.S. 284, 194 (1998), that the jury must find Petitioner was aware of 26 U.S.C. § 7201; to reverse the 7th Circuit in *Salberg v. U.S.* 969 F.2d 379, 384 (7th Cir. 1992) which is in conflict with this Court's decisions *Dole v. United Steelworkers*, 494 U.S. 26 (1990), *Cheek v. U.S.*, 498 U.S. 192, 199-200 (1991) regarding the requirement to provide answers to the IRS on their typical requests for information Forms; find Petitioner's 5th and 6th Amendment Rights were violated by the Court in preventing witnesses to testify; dismissal on Rule of Lenity was appropriate; and this Court reverse the usage of a "whipsaw" in determining "tax loss" to established "guideline range" as unreasonable.

OPINIONS BELOW

On November 10, 2004, the District Court denied Petitioner's Motions to Dismiss regarding defects in the indictment connected to willfulness as well as defects in 26 U.S.C. § 7201. On July 22, 2005, the District Court denied Petitioner's Motion for Judgment of Acquittal regarding the evidence of knowledge of the law and challenges raised supporting dismissal on rule of lenity grounds. On September 6, 2006, the District Court denied Petitioner's Motions to Dismiss involving the Paperwork Reduction Act violations raised at any time and regarding the absence of the evidence required by the Supreme Court in Cheek and Bryan. On September 26, 2006, the District Court dismissed Counts 1-7 of the original indictment entered Judgement against Petitioner on Counts 2-7 of the Superceding Indictment dated September 2, 2004. On November 14, 2007, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's decisions.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was final November 14, 2007. Jurisdiction herein is pursuant to 28 U.S.C. § 1254(1) and Article III, § 2 of the U.S. Constitution.

CONSTITUTION AND STATUTES

The Fifth Amendment Right to be indicted as to each element of a crime under 26 U.S.C. 7201, namely "willfulness"; the 6th Amendment right to have a jury find evidence beyond a reasonable doubt as to the element of wilfulness; the 5th and 6th Amendment Right to confront witnesses to which Petitioner relied, called the "reliance defense"; the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501-3520 (1995), called the "Paperwork Reduction Act Defense"; rule of lenity; and whether under the 6th Amendment it was unreasonable for the District Court to rely upon an amount of tax loss that included a "whipsawing" by the United States to establish the guideline range.

STATEMENT OF THE CASE

On or before April 15, 1996,[1] for the calender year 1995, and on or before April 15, 1997 for the calender year 1996, and again on or before April 15, 1998, for calender year 1997, Petitioner received, as prepared by an accountant, Federal Income Tax Returns for he and his wife[2] personally. Petitioner submitted these prepared forms answering the Secretary's questions to the Internal Revenue Service. Petitioner was also head of a Corporation named "Patridge Insurance Services, Inc."[3] Form 1120s were submitted for the Corporation for each of these years. Petitioner was also invested into a retirement plan involving a single Trust in the name of Patridge Asset

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[1]The IRS testified at trial that they chose not to object to the 1995 filings which led Petitioner to believe what he was doing was accepted, as the numerous attorneys and CPAs advised Petitioner.

[2]Applicant's wife did not work or perform any services outside of homemaker and was not indicted by the Grand Jury.

[3]The primary and only revenue producing product sold was insurance, and in some instances annuities, which can be considered securities.

Management Trust.

The same accountant also prepared Form 1041s for each of these applicable years, and Petitioner submitted those prepared answers to the IRS. Each of these Forms contained all the information regarding income received by Petitioner as indicated by the Forms 1099.[4] The accountant eventually pled guilty to tax crimes in exchange for his testimony involving the clients he instructed including acts in connection with Petitioner.

Petitioner[5] was led to believe and continued advancing these tax saving measures as Petitioner had no reason to believe otherwise until at least August, 1999, and no later than January 27, 2000. Petitioner maintained the same system of filing with regard to 1040s, 1041s and 1120s for the Calender Years 1996, 1997 and 1998.

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[4]The Panel stated it was sufficient as long as the income was reported. Add. 47

[5] The IRS did not object to the Calender Year 1995 filings prepared by the same account and to which the IRS testified at trial they were clearly aware of and chose not to.

In June of 1999, after the 1998 returns were completed and submitted by the same accountant, the IRS made contact with Petitioner by letter seek cooperation to audit the 1996 and 1997 Form 1040s prepared for Petitioner. Count 1 of the Superceding Indictment is derived from the 1998 filings.[6] The evidence at trial proved that within 30 days of this initial contact letter by the IRS, Petitioner caused a written communication to the IRS to be written and submitted which sought answers to certain questions regarding the ground rules for the proposed audit for Calender Year 1996 and 1997. Petitioner did not receive any specific response to his questions regarding the ground rules of the audit.[7]

On January 27, 2000, the IRS issued a Statutory Notice of Deficiency for calender years 1996 and 1997 to both Petitioner, and also to Patridge Asset

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[6]Petitioner was found not guilty of making a false return for 1998 as alleged in Count 1 because he did not make the returns at issue.

[7]Agent Miller testified he abandon IRS policy and directed "Stat Notices" to be issued without answering Petitioner's questions regarding ground rules.

Management Trust, pursuant to its authority given by Congress at 26 U.S.C. § 6213. The IRS utilized an illegal and legally undefined procedure called "whipsaw" under color of its authority in section 6213. At trial, this double tax methodology was explained by each Agent who took the stand to be unsupported by any specific Internal Revenue Code provision. Count 2 of the indictment is derived from these Notice of Deficiencies. A 1999 set of returns would have been filed save the January 27, 2000 claims made by the IRS.[8] Count 3 of the indictment is derived from the allegation Petitioner did not file the forms as he had filed for 1995 through 1998 under an evasion of assessment theory.

On June 2, 2004, a Federal Grand Jury sitting in the Central District of Illinois issued a Seven Count indictment against Denny R. Patridge. On September 1, 2004, after the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), the Government presented a Superceding Indictment to the Grand Jury adding certain factual

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[8]Applicant's first attempt at changing course.

findings to be presented at trial.

The Government in the Superceding Indictment, after *Blakely*, claimed the Grand Jury alleged "more than $ 30,000" which meant under the guidelines less than $ 80,000.00 for the proposed tax loss in the event Petitioner was determined guilty of the charges involving tax loss.[9] After this Court's decision in *Booker v. U.S.* 543 U.S. 220 (2005), the Government filed and was granted, over Petitioner's objections, the right to strike the Grand Jury changes made in the September 1, 2004 superceding indictment regarding sentencing factors. The District Court referred to this decision to allow the Grand Jury words deleted being based upon Justice Ginsberg's "flip flop" from Booker I to Booker II.

Both the indictment and superceding indictment alleged in Count 1, a violation of 26 U.S.C. § 7206(1) in the willful making of a false statement on

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[9]This is why the whipsaw is so important because if the Government had to prove to a jury the amount of tax loss it was between $30,000 but less than $80,000 but if a District Court Judge is to find the tax loss then the amount exceeds $ 200,000!

a 1998 Form 1040.[10] Count 2 alleged a violation of 26 U.S.C. § 7201 in that Petitioner attempted to willfully evade and defeat the payment of income taxes owed for Calender Years 1996 and 1997, based upon a single[11] Notice of Deficiency ("NOD") that did not result in a Petition filed with Tax Court dated January 27, 2000. The NOD was issued after the IRS decided they did not like the way Petitioner provided the income information to the IRS. [12] Count 3 alleged a violation of 26 U.S.C. § 7201 in that Petitioner attempted to willfully evade and defeat the

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[10]Petitioner contends not answering questions truthfully is synonymous with failing to comply pursuant to the Paperwork Reduction Act of 1995.

[11]Another reason Petitioner moved to dismiss Count 2 was because section 7201 did not provide any theory by which taxes owed for both 1996 and 1997 would be due and owing on the same date. Returns for both years were made on their respective April 15, 1997 and 1998 dates.

[12]The Panel stated that "One reason for this is that §7203 requires a 'return' but does not define that word or require anyone to use Form 1040, or any 'official' form at all. All that is required is a complete and candid report of income."

assessment of income taxes by the IRS for Calender Year 1999 by failing to provide answers to the IRS questions on Form 1040 and other various forms.[13] Counts 4 and 5 alleged a violation of 18 U.S.C. § 1343, commonly known as the "wire fraud statute" involving the money claimed in Count 2 to have been evaded by Petitioner in the payment of income taxes allegedly owed for Calender Years 1996 and 1997. Count Six alleges a violation of 18 U.S.C. § 1956(a)(1)(B)(i). Count Seven alleges a violation of 18 U.S.C. §1956(a)(1)(A)(ii).

The Jury sent the Court a request to explain the different legal meaning between "evade and avoid". The Jury found Petitioner Not Guilty of Count 1 and Guilty of Counts 2, 3,4,5,6 and 7. The issues in this

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[13]To date, Petitioner is the only person indicted for following the advice of attorneys for the Aegis Company and others and to whom the District Court refused to allow to testify because of the Fifth Amendment. In moving to dismiss for selective prosecution, the District Court orally stated that just because Petitioner was the first does not mean he is the only. Petitioner, 4 years later is the only and with the statute of limitations having ran out, it would appear Petitioner will be the only out of 3000 clients of Aegis.

case center around the meaning of the term "willfully" and whether specific knowledge of the law Petitioner was accused of violating in Counts 1,2 and 3, is an excepted essential element of certain federal criminal tax offenses included in those Counts. Counts 4,5,6 and 7, each hinge upon the outcome of Count 2 as they each involve transactions in money which the superceding indictment alleges were taken to evade the payment of taxes for 1996 and 1997. It is essential for the Government to maintain Count 2 in order for Counts 4,5,6 and 7 to be maintained.[14]

At all times during the criminal trial pending in the District Court, Petitioner, through Counsel, maintained that according to the Supreme Court decisions in *Cheek v. U.S.*, 498 U.S. 192, 201 (1991),

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[14]If the Jury did not find Petitioner aware of section 7201 for Count 2 then likewise the Jury would not have been allowed to find the Petitioner aware of section 7201 in Count 3 unless they found sometime after April 15, 1998, Petitioner became aware of section 7201 but before April 15, 1999. No such evidence was presented by the Government. Petitioner testified on his own behalf at trial and at no time did the Government cross examine Petitioner as to his knowledge of section 7201 or any other provision or regulation.

Ratzlaf v. U.S., 510 U.S. 135, 149 (1994), and *Bryan v. U.S.*, 524 U.S. 284, 194 (1998), the burden on the Government was to prove Petitioner had specific knowledge of the specific provision alleged in Counts 1,2 and 3, that the Grand Jury alleged Petitioner knowingly violated.

Petitioner also maintained that none of the requests for income tax information at issue in this case complied with 44 U.S.C. §§§ 3506(c)(1)(B), 3507 nor 3512.

The District Court rejected Petitioner's willfulness assertions both prior to trial in a Motion to Dismiss, Add. 1, during trial, during the jury instructions conference toward the end of trial, jury instructions, as well as at the close of trial both in a Motion for Judgment of Acquittal (twice), Add. 26, a Motion for New Trial, and in Motions prior to sentencing regarding willfulness and the Paperwork Reduction Act, while the case was pending. Add. 29 The issues herein are well preserved for appeal purposes to which the Government did not object.

During Trial Petitioner called witnesses he relied upon for the actions at issue in the Superceding

Indictment and the District Court refused to allow each of the 5 Attorneys to testify on grounds the Government informed the Court these 5 Attorneys were under investigation.[15] Prior to sentencing it was revealed by the Government that one of the main witnesses to which Petitioner relied was originally investigated at the direction of Honorable Chief Judge Michael P. McCuskey, whom both performed the trial in this case and the decision to prohibit Attorney Brent Winters to testify as to what he advised Petitioner. He eventually was assigned to the trial of Mr. Winters and later recused himself.

Sentencing took 15 months after trial because the IRS did not yet have the amounts they wished the District Court to impose as the "tax loss" upon the sentence of Applicant.[16][17] At all times it seemed the Trial Court would not rely upon the whipsaw amounts

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[15]Presumably for the very advice they each gave Petitioner!

[16]At all times Applicant has objected to any finding of facts by the District Court to then use said findings to determine a guideline range.

[17]An amount struck from the indictment.

as an input into the objected-to, judicial fact-finding regarding tax loss. On September 26, 2006, the District Court sentenced Petitioner to the maximum of 60 months in prison allowed by statute and based its decision on the tax loss claimed owed by the Government in the whipsaw Notice of Deficiencies after trial which also included interest and penalties. Petitioner objected to this finding of facts by the trial court in his objections to the PSI report as well as at the sentencing hearing, including that interest and penalty were prohibited by the Paperwork Reduction Act of 1995. See 44 U.S.C. § 3502(14).

Petitioner, through Counsel, timely appealed the District Court's decisions and judgment and sentence to the United States Court of Appeals for the Seventh Circuit who on November 14, 2007, decided that each of the issues raised for Petitioner on appeal were "frivolous" and threatened disbarment proceedings against Petitioner's Attorney.

This Petition for Writ of Certiorari to the Seventh Circuit follows.

ARGUMENT IN FAVOR OF GRANTING THIS WRIT

i. **In a Federal Criminal Tax Case where an element of the alleged crime is the Petitioner acted with specific intent to violate the law, termed as to have acted "willfully," this Court has routinely held the United States is required to prove beyond a reasonable doubt, and the jury must find, that the person charged was "aware of the specific provision of the tax code he is accused of violating" as held by this Court in *Cheek v. U.S.*, 498 U.S. 192, 201 (1991), issued to the Seventh Circuit, and as expanded in *Ratzlaf v. U.S.*, 510 U.S. 135, 149 (1994), and clarified *in Bryan v. U.S.*, 524 U.S. 284, 194 (1998) yet the Court's below rejected this Court's well founded exception applicable to Petitioner.**

There is no dispute between the parties as to the knowledge of the specific provision Petitioner was alleged to have violated. He simply was unaware of it. Add. 43 The Government twice argued in opposition to Petitioner's Stay and Release request to the 7th Circuit and in their Principal Brief that:

> "While it is true that *Bryan v. United States*, 524 U.S. 184, 194(1998) stated in dictum that to convict a defendant of willful violations of the tax law, the jury must find that the 'defendant was aware of the specific provision of the tax code

he was charged with violating,' *Cheek v. United States*, 498 U.S. 192(1991), **the cases cited for that proposition doe not so hold.**"

The Government went on to say that:

"Cheek requires only that the government prove that the defendant had knowledge of his legal duty to file and pay taxes. It does not require the government to prove that the defendant knew of the specific provision of the Internal Revenue Code he is charged with violating."

The 7th Circuit Panel addressed this by saying:

"For that matter, many tax lawyers (and most judges) could not rattle off the citations without glancing at a book.....Cheek derived its knowledge of the law requirement from the fact that § 7201 makes only 'willful' tax evasion criminal. An act is willful for the purpose of the tax law, the Court concluded, when the taxpayer knows what the code requires yet sets out to foil the system. **Knowledge of the law's demands does not depend on knowing the citation any more than the ability to watch a program on TV depends on knowing the frequency on which the signal is broadcast.**"

At issue is this Court's subscribed, accepted and "legal exception" meaning of the word "willfully" as that term appears in Title 26 of the United States Code, and more specifically, pursuant to 26 U.S.C. §§ 7201 and 7206(1)[18], since those provisions have affected Petitioner's rights to liberty and property.

In *Cheek v. U.S.*, 498 U.S. 192, 199 (1991) this Court reaffirmed the "general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. See, e.g., *U.S. v. Smith*, 5 Wheat. 153, 182 (1820) (Livingston, J., dissenting); *Barlow v. U.S.*, 7 Pet. 404, 411 (1833); *Reynolds v. U.S.*, 98 U.S. 145, 167 (1879); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Liparota v. U.S.*, 471 U.S. 419, 441 (1985) (WHITE, J., dissenting); O. Holmes, The Common Law 47-48 (1881)." Id.

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[18]Included though the jury found Petitioner Not Guilty of Count 1 because he did not make the return at issue, an accountant named Larson did make.

This "notion" was based on the law being "definite and knowable, the common law presumed that every person knew the law. This common law rule has been applied by the Court in numerous cases construing criminal statutes. See, e.g., *U.S. v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971); *Hamling v. U.S.*, 418 U.S. 87, 119-124 (1974); *Boyce Motor Lines, Inc. v. U.S.*, 342 U.S. 337 (1952)." *Cheek*, supra The *Cheek* Court explained because the:

> "proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly ***softened the impact of the common law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses***." Id.

> Thus, this Court almost 75 years ago interpreted the statutory term "willfully" as used in the "federal criminal tax statutes ***as carving out an exception to the traditional rule***. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws." Id. at

In *Ratzlaf v. U.S.*, 510 U.S. 135, (1994) this Court held that "Judges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense."Id. at 141

Concluding that "to convict *Ratzlaf* of the crime with which he was charged, violation of 31 U.S.C. §§ 5322(a) and 5324(3), ***the jury had to find he knew the structuring in which he engaged was unlawful.***" Id. at 149

In *Ratzlaf,* Justice Blackmun, in writing for the dissent, said that in "interpreting federal criminal tax statutes, this Court has defined the term "willfully" as an "exception to the traditional rule," applied "largely due to the complexity of the tax laws." ***Cheek***, 498 U.S., at 200; see also *Browder v. United States*, 312 U.S., at 341-342.; *Ratzlaf*, at 156

Again, in 1998, this Court was asked to extend the "exception" applied to the term "willfully" in certain federal criminal offenses, to the offenses related to gun possession. In *Bryan v. United States*, 524 U.S. 184, 190 (1998), this Court considered whether

the explanation given by the trial judge on the meaning of the term "willfully" was contrary to law. That instruction being considered was:

> "A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, ***the person need not be aware of the specific law or rule that his conduct may be violating***. But he must act with the intent to do something that the law forbids."

Id.

While explaining the exception to willfulness announced by the Supreme Court over the then last 70 years, Justice Stevens writing for the majority stated "In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was ***aware of the specific provision of the tax code that he was charged with violating***. See, e.g., ***Cheek v. United States***, 498 U.S. 192, 201 (1991). *Bryan* at 194 The Bryan Court was simply not willing to extend the exception to cases involving Guns.

Herein begins the controversy between

Petitioner and the Government and Courts.

First, neither the District Court addressed specifically or Panel at the 7th Circuit mention nor discussed either the Bryan decision, Ratzlaf decision or did they ever identify what part of the Cheek decision they relied upon to say:

> "he insists that the maneuver may be penalized only if the taxpayer knows that 26 U.S.C. § 7201 is the section of the Internal Revenue Code that makes the dodge unlawful."

Add. 42

Contrary to the Panel's depiction, Justice Stevens explained that:

> "in order to satisfy a willful violation in *Ratzlaf*, we concluded that the jury had to find that the ***defendant knew that his structuring of cash transactions to avoid a reporting requirement was unlawful***. See 510 U.S., at 138, 149. Those cases, however, are readily distinguishable. ....**and require that the defendant have knowledge of the law**." *Bryan* at 195

Yet the Panel, in ignoring Cheek, Bryan and Ratzlaf asserts that:

> "Knowledge of the law's demands does

> not depend on knowing the citation any more than the ability to watch a program on TV depends on knowing the frquency on which the signal is broadcast."

App.44

The 7th Circuit in *Salberg v. U.S.* 969 F.2d 379, 384 (7th Cir. 1992) said that "[i]t was a federal statute - **26 U.S.C. § 7203** -... that required *Salberg* to file an income tax return."[19] [20]

Though Chief Justice Easterbrook was a member of the Panel in Salberg, and though he says section 7203 mandates the requirement to provide a "complete and candid report of income" the Panel holds that as long as the Appellant "knows what the code requires" he does not have to be shown to have known specifically what the code requires. This

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[19]The second reason for Granting this Petition for Writ of Certiorari explains in more detail how Salberg was wrong in many respects including its decision to disregard the Supreme Court's decision in *Dole v. United Steelworkers*, 494 U.S. 26 (1990)

[20]The Government in its citation to Salberg omits section 7203 and replaces it with section 6012.

simply shows the Court's constradition.

Section 7203, like 7201 and 7206, are criminal provisions which are attempting to prohibit certain omissions or commissions. See *Sansone v. U.S.*, 380 U.S. 343, 351 (1965)("This misdemeanor requires only willfulness and the omission of the required act) ("and an affirmative act constituting an evasion or attempted evasion of the tax")

Another of the issues in this case stems from the Jury asking the District Court what was the difference between the words "evade" and "avoid" as the Court had mixed both terms in the willfulness instruction over Petitioner's multiple objections.[21] Currently Petitioner resides in Federal Prison in Indiana for being found guilty of violating 26 U.S.C. § 7201 twice, once on the theory of payment and once on the theory of assessment, which led to the other four Counts of conviction dealing with "wire fraud" and

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[21]In *U.S. v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992) defining "*avoidance of a tax by remaining outside the ambit of the law...*" *CIR v. Newman*, 159 F.2d 848, 850-851 (CA2) (L. Hand, J., dissenting), *cert. denied*, 331 U.S. 859 (1947).

"money laundering" while at no time does anyone dispute the fact Petitioner was not aware of section 7201 or how the actions Petitioner participated in violated section 7201. It could not even be shown whether Petitioner was aware of the different types of offenses that would result in a violation of section 7201 like the difference between "evade or defeat the tax imposed" vs. "evade or defeat.... the payment thereof."

The Government and both inferior Courts have rejected without comment or explanation this Court's long standing mandate in carving out the exception articulated in *Cheek, Ratzlaf and Bryan,* which holds the Government must allege as an element and the jury must find beyond a reasonable doubt that Petitioner was aware of the specific provision of the tax code, section 7201, that he is alleged to have violated.

Petitioner was simply unaware of what section 7201 actually says, prior to his indictment, and no evidence exists that shows Petitioner was aware that what advise he was following violated this or any other internal revenue code provision.

ii. Tax forms are "typical information collection requests", this Court said in *Dole v. United Steelworkers*, 494 U.S. 26, 32 (1990) and because they are "inexorably" linked to the payment of taxes, when a request fails to "comply" with the Paperwork Reduction Act of 1995, specifically with 44 U.S.C. §§§ 3506(c)(1)(B), 3507 and 3512(a), Petitioner should never have been subjected to any penalty and likewise should have been granted relief from being subject to penalty under 26 U.S.C. § 7201. Section 7201 does not withstand 44 U.S.C. § 3512(a)(1995)

The current public protection provision, 44 U.S.C. 3512 reads:

> (a) Notwithstanding any other provision of law, **no person shall be subject to any penalty** for failing **to comply with a collection** of information that is subject to this subchapter if
>
> > (1) the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or
> >
> > (2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(b) **The protection provided by this section may be raised** in the form of a complete defense, bar, or otherwise **at any time during the agency administrative process or judicial action applicable thereto.**

See 44 U.S.C. § 3512. See also, *Pond v. CIR*, T.C. Memo 2005-255, WL 18928 decided 10911-02 (10th.1-4-07)(unpublished); See also *U.S.v. Chisum*, 502 F.3d 1237 (10th Cir.2007)

On the IRS web page "irs.gov" the Secretary directs at http://www.irs.gov/businesses/small/article/0,,id=109046,00.html :[22]

> Privacy Act Statement and Paperwork Reduction Act Notice
>
> This notice is given under the Privacy Act of 1974 and the paperwork Reduction Act of 1995...
> Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a valid OMB control number....

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[22]This Court can take judicial notice of this fact.

At issue here is the meaning and application of the Paperwork Reduction Act of 1995 and whether the protection provided the public by this act, specifically, 44 U.S.C. §3512(a), applies to penalties, as defined by Congress in 44 U.S.C. §3502(14)(1995), sought by the United States Department of Justice representing the Internal Revenue Service.[23]

The term "penalty" at 44 U.S.C. §3502(14)(1995) is defined as "the imposition by an agency or court of a fine or other punishment; a judgment for monetary damages or equitable relief..." At issue herein against Petitioner is whether he should be penalized for violating 26 U.S.C. § 7201, if it could be found each element of that alleged offense could be proved to a jury beyond a reasonable doubt. There is no question 26 U.S.C. §7201 provided potential notice to the public of the possible penalty associated with violating section 7201.

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[23]The Panel says what happened in 1995 is the Paperwork Reduction Act of 1980 was "amended" and thus it is proper to refer to the Paperwork Reduction Act of 1980 in the printed papers the IRS publishes instead of the Paperwork Reduction Act of 1995. See Revenue Ruling 2006-21.

At issue in Count 1 of the indictment was whether Petitioner made a false statement while supplying information upon Form 1040 requests to the Internal Revenue Service. The Jury said no! Count 2 involved whether the information provided by Petitioner on request Forms 1040, 1041, and 1120, were accurate in reporting the total income received respectively. Count 3 involved whether Petitioner was required to provide information to the Internal Revenue Service on Form 1040 for the year 1999.

In *Dole v. United Steelworkers*, 494 U.S. 26 (1990) this Court held "tax forms" were "typical information collection requests" subject to the Paperwork Reduction Act. Id. at 32-33 The 1995 Paperwork Reduction Act was enacted to strengthen the 1980 version at issue in *Dole*, supra.

This Court in *Dole* said:

> "While the grammar of this text can be faulted, its meaning is clear: the public is protected under the Paperwork Reduction Act from paperwork regulations not issued in compliance with the Act, only when those regulations dictate that a person maintain information for an agency or provide information to an agency."

Id at 40

The Dole decision was in 1990 and involved the terms employed by Congress in the 1980 Paperwork Reduction Act which said "Not withstanding any other provision of law, no person shall be subject to any penalty for failure to maintain or provide information..." The changes to this "public protection" provision in 1995 removed "fails to maintain and provide" and added "fails to comply..."

To be clear, 26 U.S.C. § 6011 says:

> "When required by regulation prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement **according to the forms and regulations** prescribed by the Secretary."

The 7th Circuit holds in *Salberg*, 969 F.2d 379 (7th Cir. 1992) the PRA does not constitute a defense to a prosecution under 26 U.S.C. § 7203. The Government argued "the argument that a person is not liable for his tax deficiency because various forms used by the Internal Revenue Service displayed invalid control numbers has been rejected by every court to

consider it, on the ground the PRA does not alter the statutory requirement to file an income tax return." Petitioner argues the person may be liable for their tax "deficiency" but not for any penalty. And certainly not a whipsaw.

In making this claim the Government points to *U.S. v. Neff*, 954 F. 2d 698, 699-700 (11th Cir. 1992), *U.S. v. Dawes*, 951 F.2d 1189, 1193 (10th Cir. 1991), *U.S. v. Hicks*, 947 F. 2d 1356, 1359 (9th Cir. 1991), *U.S. v. Kerwin*, 945 F.2d 92 (5th Cir. 1991), *U.S. v. Collins*, 920 F.2d 619, 630-31, Revenue Ruling 2006-21.

What is apparent by the Government's theory that the Paperwork Reduction Act of 1995 does not apply to the Internal Revenue Service requests for income information is that each of the cases cited by the Government either are taken out of context or are in defiance of this Court's decision in *Dole*. Each hold that some provision of the Internal Revenue Code withstands section 3512.

For instance, in *Salberg*, the 7th Circuit said it was section 7203 that required *Salberg* to file an income tax return. Yet, when citing to this part of Salberg, the U.S. Department of Justice replaces

"section 7203" with "..." and then after the end of the reported quote says "see 26 U.S.C. § 6012."

If section 7203 is the penalty provision *Salberg* sought protection from, then the Government claims that holding is an error made by the 7th Circuit. This was because in *Neff*, the 11th Circuit said section 6012 required *Neff* answer the IRS questions on request Form 1040. *Neff* at 700. This is, of course, contrary to the *Salberg* decision as reported by the 7th Circuit.

Next, the Government cites to *U.S. v. Dawes*, 951 F.2d 1189, 1193 (10th Cir. 1991) to further support its theory that Petitioner cannot rely upon the Paperwork Reduction Act of 1995 to defend his actions alleged against him in the Grand Jury superceding indictment.[24] Though the Government picks a sentence out of context in *Dawes*, the actual holding in *Dawes* is that "as long as the 1040 complies with the Act, nothing more is required." *Dawes*, at 1193 *Dawes* also referred to what the 6th Circuit in *U.S. v.*

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[24]Footnote 2 in Dawes represents an alarmed Panel who were identifying the non unified position on the PRA and what it reached argued in different Circuits by the same DOJ.

Wunder, 919 F. 2d 34 (6th Cir. 1990) and 9th Circuit reported in *U.S. v. Hicks*, 947 F. 2d 1356, 1359 (9th cir. 1991) as an exception to the Paperwork Reduction Act of 1980 is a "statutory origin theory" of which the 10th Circuit did not subscribe.

The Paperwork Reduction Act says "Notwithstanding any other provision of law" to which Petitioner argues section 7203, 6012, 6011, and any other code provision do not withstand section 3512. The 8th Circuit followed the 10th Circuit in *U.S. v. Holden*, 963 F.2d 1114 (8th Cir. 1992) with "as long as the 1040 complies nothing more is required." The 6th and 9th Circuit held in *Wunder and Hicks*, respectively, state that both sections 6012 and 7203 were the statutory origin theory which they concluded withstand section 3512 as argued by the Government. The 5th Circuit in *U.S. v. Kerwin*, 945 F.2d 92 (5th Cir. 1991) just said it was the "statutes" that required Kerwin to provide answers to the questions on Form 1040.[25]

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[25]How could the Government prove what Petitioner was aware of in a duty to file and pay when the Federal Courts cannot agree and are not

The Government's argument[26] regarding *U.S. v. Collins*, 920 F.2d 619, 630-31 and, Revenue Ruling 2006-21 were intentionally misleading. In footnote 12 of the *Collins* decision, the 10th Circuit stated:

> "In *United States v. Tedder*, 787 F.2d 540, 542 (10th Cir. 1986), this court held that tax forms were not information collection requests subject to the Paperwork Reduction Act because the filing of income tax returns was obligatory. **This holding is superseded by the Supreme Court's analysis in Dole v. United Steelworkers, ___ U.S. ___, 110 S.Ct. 929, 933, 108 L.Ed.2d 23 (1990), which included federal income tax forms within the category of information collection requests under the Act.**

The 10th Circuit recently rendered its "published" decision in *U.S. v. Chisum*, 502 F.3d 1237 (10th Cir. 2007),

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unified with each other on a theory to support that alleged duty?

[26]The Panel completely ignored the notice Counsel for Petitioner gave the Court regarding the Chisum decision as well as the Dole and Collins holding to which it was based.

decided September 25, 2007, where that Panel[27] addressed whether the Paperwork Reduction Act reached the making of false statements by saying:

> C. The Paperwork Reduction Act (PRA)
>
> The PRA, 44 U.S.C. § 3501-20, precludes the imposition of any penalty against a person for "failing to comply with a collection of information" if either (1) it "does not display a valid control number" or (2) the agency fails to alert the person that he or she "is not required to respond to the collection of information unless it displays a valid control number." 44 U.S.C. § 3512(a). A § 3512(a) defense may be raised at any time. See id. § 3512(b). Tax forms are covered by the PRA. See Dole v. United Steelworkers of Am., 494 U.S. 26, 33 (1990).
> Mr. Chisum contends that "[s]ince there was no proof that Form 1040 was a lawful form under the [PRA], the trial court erred in failing to grant [his] request [at the sentencing hearing] to dismiss the indictment." Aplt. Br. at 29. **But the PRA protects a person only "for failing to file information. It does not protect one who**

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[27]Same Panel who wrote the unpublished decision in Pond v. CIR on January 4, 2007 cited above.

> **files information which is false." Collins, 920 F.2d at 630 n.13** (internal quotation marks omitted). The charges against Mr. Chisum were predicated on the filing of false information, not the failure to file. He is therefore not entitled to relief.

Chisum, pg 12

The *Collins* footnote referred to in the Panel decision in *Chisum* states:

> "...We recognize that because defendant was charged with tax evasion and not failure to file tax returns, he technically was not being prosecuted for failure to provide information. Had defendant's tax evasion been effectuated through the filing of falsified tax returns, Weiss would dictate that no Paperwork Reduction Defense would be available to him. But because the provision of information in 1040 forms is inexorably linked to the statutory requirement to pay taxes, and defendant failed to file such forms, the Paperwork Reduction Act was applicable to such conduct."

There simply is no question the 10th Circuit held this Court determined "federal income tax forms within the category of information collection requests

under the Act" (citing to *Dole*) describing it as "inexorably linked to the statutory requirement to pay taxes". This means Form 1040, 1041 and 1120 would be subject to the public protection provision. Yet, the Government continues to argue and both inferior Courts below continue to accept that any theory of criminal prosecution, which included a claim derived from either the supplying of information on an IRS request form that was bootleg or a failure to comply with an IRS request, is "a mystery" and thus the PRA is a precluded defense. Add. 46 The Government and Court simply overlook the phrase judicial action in section 3512 as well as the term "penalty" defined at 3502(14)(1995) including a "Court" and any "right".

In *U.S. v. Bentson*, 947 F.2d 1353 (9th Cir. 1991), the 9th Circuit discussed the 10th Circuit's decision in *U.S. v. Collins*, 920 F.2d 619, 630-31, fn. 12-13 (10th Cir. 1990), and stated they believe that the PRA was not intended to provide a defense under section 7203, and "therefore we disagree with the Collins court's dicta." *Bentson*, at 1355

Since at least 1995, Congress, at 44 U.S.C. §3506(c)(1)(B) directs the Director of OMB to "ensure"

the IRS application's attached proposed request for income tax information form displays the following criteria:

(i) inventoried, displays a control number and, if appropriate, an expiration date;

(ii) indicate the collection is in accordance with the clearance requirements of section 3507; and;

(iii) informs the person receiving the collection of information of;

(I)he reasons the information is being collected;

(II) the way such information is to be used;

(III)an estimate, to the extent practicable, of the burden of the collection;

(IV) whether the responses to the collection of information are voluntary, required to obtain a benefit, or mandatory; and

(V) the fact that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number[28]

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[28]P.L. 104-13(1995), pg. 206-207 USCCAN- 1. "Section 3506(c) mandates a detailed information

It is clear to anyone looking at the request Form 1040, 1041 or 1120 that none of these forms comply with 44 U.S.C. §§§ 3506(c)(1)(B), 3507 and 3512. It is equally clear that "no person shall be subject to any penalty" unless the form does display a "valid OMB control number" "issued in accordance with this chapter." See 3512(a)(1)(1995) None of the forms at issue in this case are in accordance with §§§3506, 3507 or 3512 and the Government and Court never dispute this fact.

Though the Panel stated that:

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collection evaluation procedure...; Ensure that information collections are inventoried, display a control number and, when appropriate, an expiration date; indicate the collection is in accordance with the Act; and contain a statement informing the person being asked why the information is being collected, its use, its burden, and whether responses are voluntary, required to obtain a benefit, or mandatory. This requirement is transposed from current law (section 3504(c)(3)) to make it more clearly an agency responsibility, rather than a duty of OMB. Note that this requirement must also be certified to by each agency (see section 3506(c)(3)(F); and Assess the information collection burden of proposed legislation affecting the agency."

Finally, Patridge contends that all IRS forms are invalid because they do not tell taxpayers that the lack of a valid control number means that they need not supply any information. How any of this could block a conviction for tax *evasion* is a mystery.

The Panel continued:

"Finally, we have no doubt that the IRS has complied with the Paperwork Reduction Act. Form 1040 bears a control number from OMB, as do the other forms the IRS commonly distributes to taxpayers. That this number has been constant since 1981 does not imply that OMB has shirked its duty. Section 3507 requires periodic review, not a periodic change in control numbers. Patridge offers us no reason to think that the necessary review has not been conducted. The control number on Form 1040 appears on OMB's web site as a current, valid number; if this is wrong, it takes more than a lawyer's say-so to establish the proposition."

Add. 47

So, just what does it take to establish in evidence that the request for information neither

complies with 44 U.S.C. §§§ 3506(c)(1)(B), 3507 or 3512(a)(1995)? No one disputes the Forms are in evidence. In Pond, the 10th Circuit said the reason why they could not determine whether the Form complied was because Pond did not tender the Forms in the record. Each Form is in the record in this case. Did the 7th Circuit hold the Forms at issue contained all the information required by section 3506? No! Does the Panel state the Form indicates compliance with section 3507? No! Does the Panel dispute the Form fails to comply with 3512(a)(I) and (ii)? No!

Yet, the 7th Circuit holds the Forms are "valid" and at the same time, says even if they were not valid, so what. Petitioner argues It takes a lawyer's say so or a person being threatened with penalty to begin the "defense" provided by section 3512.

Congress did not say the test was whether OMB lists the Form 1040 on its web page. Congress said the person responding to the information is to determine validity compared to sections 3506(c)(1)(B), 3507 and 3512(a)(1995). This Court in Dole even told the public to refuse to answer bootleg

requests as a way to help control outlaw forms. at 43.

Petitioner is at loss for how any provision from section 7201 through 7206 withstands section 3512 when 3512 says "notwithstanding any other provision of law."

A. Statutory Origin Theory vs. Regulatory Requirement.

Besides the *Dole* Court saying "tax forms" were "typical information collection requests" subject to the PRA (of 1980), id. at 32-33, the Supreme Court in *CIR v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944) stated "Congress has given discretion to the Commissioner to prescribe **by regulation forms** of returns and has made it the duty of the taxpayer to comply." The Supreme Court in 2000 restated its conclusion in *U.S. v. Hubbell*, 530 U.S. 27, 35 (2000) that "incriminating evidence may be the by-product of obedience to a ***regulatory requirement***, such as filing an income tax return,.." The Supreme Court also, when announcing the exception to the general definition of willfulness in criminal tax cases, said the "proliferation of statutes **and regulations** has sometimes made it difficult for the

average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Cheek v. U.S.*, 498 U.S. 192, 199-200 (1991); See also *U.S. v. Mersky*, 361 U.S. 431, 437 (1960)("An administrative regulation,...., is not a 'statute.'")

The D.C. Circuit in *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 31 (D.C. Cir. 1998) held the protection provided by section 3512 precluded by "5 C.F.R. 1320.6(e)" "'does not extend to situations in which a statute authorizes, or directs, an agency to impose a collection of information on persons, and the agency does so.' Controlling Paperwork Burdens on the Public; Regulatory Changes Reflecting Recodification of the Paperwork Reduction Act, 60 Fed. Reg. 30438, 30441 (1995)." OMB cites to section 6011 as the place to begin at 5 CFR 1320.6(e).

While addressing the reasons for the changes between the 1980 and 1995 Paperwork Reduction Acts, Congress said its purpose for amending the 1980 PRA was to clarify that it originally was enacted to among other things, "eliminate exemptions" for the "Internal Revenue Service". *House Report, 104-13, [page 8] at 171 (1995)*. The only reason it was

modified to add certain terms was to maintain consistency and clarity and to "**unequivocally cover all collections of information**." *House R. [page 54] at 217.*

The Panel has refused to grant relief or consider the errors based on the holding in Salberg and that it says it's a mystery how 7201 tax evasion and the Paperwork Reduction Act of 1995 are connected in any way while the 10th Circuit in Collins, referenced recently in Chisum, held the requirement to provide answers on Forms such as the 1040 are inexorably linked to the requirement to pay taxes. This division of the Circuits is clear.

iii. It is a violation of the 6th Amendment confrontation clause and 5th Amendment right to due process for the District Court Judge, who personally triggered a criminal investigation of a key witness for the defense, to sit in judgment of the trial of Petitioner and to determine the 5th amendment rights of Petitioner's witness without disclosing the District Court Judge's involvement in the prosecution of Petitioner's witness.

This issue is short. Petitioner relied upon the advice of at least 5 Attorneys all of which were not allowed to testify after being subpoenaed by

Petitioner because the Government claimed, as they were being called to testify, to the Court, they each were subject to investigation for the legal advice they gave Petitioner and others.

After trial the Government Attorney disclosed in another criminal case that she was prosecuting, that the Judge over Petitioner's trial, the Honorable Chief Judge, Michael P. McCuskey, was the sole reason an investigation began involving Attorney Brent Winters, one of the 5 Attorneys to which Petitioner relied. This disclosure came up because a Grand Jury indicted Winters and Judge McCuskey was the Judge assigned to his trial and to which both the Court and Government were the only ones aware of this connection until it was revealed. Add. 33,35,36

Had the Jury been allowed to here the testimony of at least some of the witnesses Petitioner relied upon, including Winters, there is no question the Jury would have found Petitioner had a good faith defense that would negate any willfulness alleged.

iv. The District Court should have granted Petitioner's request to dismiss the superceding indictment based upon rule of lenity.

With section 7201 not providing any definition for the meaning of the term "evade" and where the Court mixed the term evade with avoid, and where this confusion made its way into the definition of willfully the Court relied upon in instructing the jury as to the meaning of that term, and that the term "return" is not defined in section 7203(Add.47), as the 7th Circuit Panel declared, ambiguity in the law should have been resolved in favor of Petitioner. See *Cleveland v. U.S.*, 531 U.S. 12, 25 (2000)(instructing that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") see also *Rewis v. U.S.*, 401 U.S. 808, 812 (1971).

In Muscarellow v. U.S., 524 U.S. 125, 138 (1998) this Court held the "rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended.'" *U.S. v. Wells*, 519 U.S. 482, 499 (1997) (quoting *Reno v. Koray*, 515 U.S. 50, 5 (1995)

The Panel's conclusion that section 7203 does not define the term "return" and that no endorsement of a Form is made, simply shows the tax code, at least section 7201, requiring commission, and the omission,

7203, without commission, are ambiguous.

It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Petitioner's favor as this Court directed in *U.S. v. THOMPSON/CENTER ARMS CO.*, 504 U.S. 505, 518 (1992). See *Crandon v. U.S.* 494 U.S. 152, 168 (1990)

v. It was not reasonable for the District Court to use a whipsawed "tax loss" to determine the "guideline range" for sentencing Petitioner to the Maximum.

Limited to 9000 words Petitioner simply points out on this issue that part of the problem in this case was the whipsaw Notice of Deficiencies that were issued by the IRS on January 27, 2000, essentially imposing double or triple tax liability on Petitioner. Though the District Court at one point was positioned to have the Government prove any "loss" beyond a reasonable doubt, after Booker, the District Court described its decision to resort to judge found facts was based upon Justice Ginsberg's flip flop.

It basically took 15 months for sentencing after trial because the Government did not know how to handle the tax loss portion of sentencing. Without any

tax loss the sentence under the guideline range would be 6 months maximum.

The difference between finding no tax loss by the jury and finding a whipsaw amount by the Court was 54 months.

The question to answer here is what facts does this Court allow the District Court to find for the purpose of establishing the guideline range? Was it reasonable for the District Court to depart from 6 months to 60 months based upon finding of tax loss when the Government simply could have had the jury find that amount? Tax deficiency is an element under section 7201.

Petitioner believes as much as this Court has wrestled with the 6th Amendment and judge found facts v. jury found facts, adding 54 months was unreasonable.

CONCLUSION

Petitioner respectfully request this Court Grant this Petition for Writ of Certiorari as the issues herein affect Petitioner as well as the public in general and there needs some policy statement by this Court on how the public can benefit from decisions entered by this Court when the lower Courts seem to have a will to ignore them.

Respectfully Submitted

/s/Denny R. Patridge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

Filed 11-10-04

UNITED STATES OF AMERICA,
Plaintiff,

v. **Case No. 04-CR-20031**

DENNY R. PATRIDGE,
Defendant.

ORDER

On June 2, 2004, Defendant, Denny R. Patridge, was charged in a 20-page indictment with one count of filing a false tax return, two counts of tax evasion, two counts of wire fraud and two counts of money laundering. Defendant was represented by retained counsel, Carol A. Dison. On July 28, 2004, Defendant filed a Motion for a Bill of Particulars (#13) and a Motion to Compel Production of Special Agent's Report (#14). On August 6, 2004, the Government responded to the Motion, and, on August 17, 2004, this court entered an Order (#17) denying Defendant's Motions. This court specifically found that the 20-page indictment filed in this case was clearly adequate to apprise Defendant of the charges against him so that he could prepare for trial.

On September 1, 2004, a superseding indictment (#18) was filed against Defendant. The superseding indictment is 22 pages long and charges Defendant with the following counts: (1) filing a false tax return on or about April 12, 1999, for the calendar year 1998, in violation of 26 U.S.C. § 7206(1); (2) tax evasion based upon Defendant's actions beginning in July 2000 until the date of the return of the indictment to willfully evade or attempt to evade payment of personal income taxes due and owing for the 1996 and 1997 calendar years, in violation of 26 U.S.C. § 7201; (3) tax evasion based upon Defendant's actions in 1999 and 2000 to willfully evade or attempt to evade [page 2] a large part of his personal income tax due and owing for the 1999 calendar year, and in failing to file an individual income tax return, in violation of 26 U.S.C. § 7201; (4) wire fraud based upon Defendant's actions in 2000, which included wiring approximately $200,000 in funds in October 2000, whereby he set up a system to hide his assets from the Internal Revenue Service (IRS) by moving his money offshore to an account under his control but not under his name, in violation of 18

U.S.C. § 1343; (5) wire fraud based upon Defendant's actions in October 2000, which included wiring approximately $100,000 in funds, to fraudulently prevent the IRS from obtaining a first lien on his real estate, in violation of 18 U.S.C. § 1343; (6) money laundering based upon Defendant's actions in October 2000 of transferring funds to hide them from the IRS yet make the funds available to Defendant for use at his direction, in violation of 18 U.S.C. § 1956(a)(1)(B)(i); and (7) money laundering based upon Defendant's actions in October 2000 of transferring funds with the intent to engage in conduct constituting the evasion of payment of taxes, in violation of 18 U.S.C. § 1956(a)(1)(A)(ii).

On September 28, 2004, Attorney Jerold W. Barringer entered his appearance (#19) on behalf of Defendant[1] Attorney Barringer, on behalf of Defendant, filed: a Motion to Dismiss Count Two (#29)

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[1] At a status hearing held on November 4, 2004, Attorneys Michael Minns and Enid Williams of Houston, Texas, also entered their appearance on behalf of Defendant. Defendant is now represented by four attorneys in this case.

and Memorandum in Support (#21); a Motion to Dismiss Count Three (#22) and Memorandum in Support (#23); a Motion to Dismiss Counts Four and Five (#24) and Memorandum in Support (#25); and a Motion to Dismiss Counts Six and Seven (#26) and Memorandum in Support (#27). On October 13, 2004, the Government filed a Consolidated Response to Motions to Dismiss Counts of the Superseding Indictment (#30). Subsequently, this court granted Defendant's Motion [page 3] for Leave to File a Reply, and Defendant's Reply in Opposition to the Government's Response (#32) was filed on October 21, 2004. For the reasons that follow, Defendant's Motions (#29, #22, #24,#26) are DENIED.

I. COUNT TWO

In his 61-page Memorandum in Support of his Motion to Dismiss Count Two, Defendant has included a lengthy recitation of facts, for which there is no record support. Defendant contends that Count Two must be dismissed because it fails to allege an offense under 26 U.S.C. § 7201. The tax evasion statute

provides: "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . . ." 26 U.S.C. § 7201; United States v. Daniels, ___ F.3d ___, 2004 WL 2397334, at *2 (7th Cir. 2004). The elements of § 7201 are "willfullness; the existence of a tax deficiency; and an affirmative act constituting evasion or attempted evasion of the tax." Daniels, 2004 WL 2397334, at *2, quoting Sansone v. United States, 380 U.S. 343, 350 (1965). The court in Daniels specifically held that "the government need not charge a substantial tax deficiency to indict or convict under 26 U.S.C. § 7201." Daniels, 2004 WL 2397334, at *4.

Defendant first argues that the indictment is insufficient because the issue of liability is still "pending"under section 6330(c)(2)(B) of the Internal Revenue Code. Defendant states that, on November 28, 2000, he exercised his rights under 26 U.S.C. § 6330 and asked for a collection due process hearing prior to being required to pay the amount the Government had notified him was owed for 1996 and 1997 taxes. According to Defendant, no hearing has been held

and no determination has been made as to the amount of taxes owing. Defendant argues that he does not yet "owe" these taxes because the issue is still pending, awaiting the requested hearing. In a related [page 4] argument, Defendant also contends that all criminal proceedings involving tax liabilities for the years 1996 and 1997 were suspended after November 28, 2000, when he requested a due process hearing.

In its Consolidated Response, the Government first notes that Defendant has raised numerous factual issues far beyond the language of the indictment itself. This court agrees with the Government that this court cannot consider evidence in ruling on a motion to dismiss if it pertains to factual issues that should be directed to the jury during trial. See United States v. Shriver, 989 F.2d 898, 906-07 (7th Cir. 1992); United States v. McGowan, 2004 WL 909745, at *2 (N.D. Ill. 2004). In fact, in considering a motion to dismiss an indictment, all facts stated in the indictment are taken as true and viewed "in the light most favorable to the government." McGowan, 2004 WL 909745, at *2, quoting United States v. Yashar, 166 F.3d 873, 880

(7th Cir. 1999).

The Government points out that a pretrial motion to dismiss an indictment is not a permissible vehicle for addressing the sufficiency of the Government's evidence. Instead, all that is at issue is whether the indictment is sufficient to charge an offense. Under Rule 7(c)(1) of the Federal Rules of Criminal Procedure, an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1).

An indictment is constitutionally sufficient and satisfies Rule 7(c)(1) if it states the elements of the crime charged, informs the defendant of the nature of the charge so that he may prepare a defense, and enables the defendant to plead the judgment as a bar against future prosecution for the same offense. United States v. Agostino, 132 F.3d 1183, 1189 (7th Cir. 1997). An indictment need not exhaustively recount the facts surrounding the crime's commission and is generally sufficient when it sets forth the offense in the words of the statute itself, as long as those words expressly set forth [page 5] all the elements necessary

to constitute the offense intended to be punished. Agostino, 132 F.3d at 1189. A defendant's constitutional right is to know the offense with which he is charged and not the details of how it will be proved. Agostino, 132 F.3d at 1191.

According to the Government, the allegations in Count Two focus on an evasion of payment of assessed tax. The Government notes that Count Two of the superseding indictment identifies the law Defendant violated as being the payment of personal income taxes due and owing for the 1996 and 1997 calendar years. The superseding indictment states that Defendant did not report a substantial amount of his income on his tax returns for 1996 and 1997. The superseding indictment also alleges that the IRS provided Defendant with notices of deficiency and notices of assessment.

The Government contends that Defendant's argument that he does not yet "owe" these taxes must fail because there is no provision prohibiting the IRS from protecting its rights in property while a taxpayer seeks a collection due process hearing. The Government also notes that it is the IRS's policy that a

criminal action in a case takes precedence over its civil aspects and that any civil enforcement action involving the same tax and periods as an active criminal investigation is suspended or deferred until the criminal aspects of the case are closed. See United States v. Peters, 153 F.3d 445, 454 n.13 (7th Cir. 1998). According to the allegations in the superseding indictment, Defendant took actions to evade payment of his taxes before he requested a collection due process hearing.

Defendant has not cited any case law in support of his argument that criminal charges cannot be brought when a due process hearing has been requested. This court must therefore agree with the Government that the indictment adequately alleges that Defendant owed taxes for the 1996 and 1997 tax years and that Defendant's request for a due process hearing does not prohibit the [page 6] Government from bringing criminal charges based upon evasion of payment of those taxes.

Defendant next argues that Count Two must be dismissed because it is outside the six-year statute of limitations. Defendant argues that there was no act

alleged which could qualify as the "affirmative act" of tax evasion of payment when the amount purportedly being evaded was not final or conclusive under 26 U.S.C. § 6330. Defendant contends that the indictment must have been filed within six years of April 15, 1997, the date Defendant filed his tax return for calendar year 1996 and within six years of April 15, 1998, the date Defendant filed his tax return for calendar year 1997. Because the original indictment was dated June 2, 2004, Defendant contends it was untimely and must be dismissed.

The Government, in response, argues that Defendant performed affirmative acts of evasion within the statute of limitations, including liquidating investments, transferring funds out of the country, bringing those funds back into this country, and loaning those funds to himself and causing a lien based upon that self-backed loan to be placed upon his home. The Government notes that these actions were taken before Defendant requested a collection due process hearing.

The Government is correct that, in a tax evasion case, it is the date of the latest act of evasion, not the

due date of the taxes, that triggers the statute of limitations. See United States v. Trownsell, 367 F.2d 815, 816 (7th Cir. 1966); United States v. McKenzie, 1992 WL 159327, at *1 (N.D. Ill. 1992); United States v. Sloan, 704 F. Supp. 880, 883 (N.D. Ind. 1989). The Seventh Circuit in Trownsell held that the latest act of evasion was depositing money in a bank in Switzerland, thus placing it beyond the reach of the Government. Trownsell, 367 F.2d at 816. In Trownsell, the court found that an indictment returned on April 16, 1964, was timely as to taxes owing for the years 1946-1953 because the transfer to the bank in Switzerland was made on [page 7] February 2, 1961. Trownsell, 367 F.2d at 816; see also United States v. Hunerlach, 197 F.3d 1059, 1064-65 (11th Cir. 1999) (statute of limitations ran from date the defendant hid rental income from the Government by purchasing the rental property under a different name). Count Two of the superseding indictment includes numerous allegations of actions taken by Defendant in 2000 which allegedly were taken for the purpose of evading or attempting to evade the payment of personal income taxes due and owing to the United

States of America for the 1996 and 1997 calendar years.

Therefore, based upon Trownsell, this court concludes that the indictment was brought within the six year statute of limitations.

Defendant also argues strenuously, in both his Memorandum and in his Reply, that Count Two should be dismissed because it does not provide a clear and concise statement of the elements of the offense charged. Defendant argues that the indictment does not adequately allege that his conduct was willful and does not allege a "substantial tax deficiency" with consistency. Defendant has also provided a lengthy and detailed argument questioning whether any of the acts alleged can be considered an affirmative act of evasion.

However, this court notes that it is well settled in the Seventh Circuit that attempts to place assets beyond the Government's reach or conceal assets are culpable affirmative acts if the tax evasion motive plays any part in the conduct. See United States v. Eaken, 17 F.3d 203, 206-08 (7th Cir. 1994); United States

v. Conley, 826 F.2d 551, 557-58 (7th Cir. 1987). Any conduct, the likely effect of which would be to mislead or to conceal, is sufficient to establish an affirmative act of evasion. Spies v. United States, 317 U.S. 492, 499 (1943); United States v. King, 126 F.3d 987, 989-90 (7th Cir. 1997); United States v. McGill, 964 F.2d 222, 230 (3d Cir. 1992). In addition, as noted previously, the Seventh Circuit recently held that no allegation of a "substantial tax [page 8] deficiency" is necessary. Daniels, 2004 WL 2397334, at *4. Moreover, Defendant's argument that the indictment is insufficient to allege willfulness is based solely on cases setting out the Government's burden of proof at trial. Defendant is certainly correct that, in order to prove willfulness, the Government is required to prove the "voluntary, intentional violation of a known legal duty." See United States v. McCaffrey, 181 F.3d 854, 856 (7th Cir. 1999), quoting Cheek v. United States, 498 U.S. 192, 201 (1991).

However, this does nothing to establish that the indictment is insufficient. In this case, Count Two of the superseding indictment alleges that Defendant owed taxes for the years 1996 and 1997, that he engaged in

affirmative acts to evade or attempt to evade payment of these taxes, and that he acted willfully. This court therefore concludes that Count Two of the indictment is sufficient to set out the elements of the offense charged and is sufficient to inform Defendant of the offense with which he is charged. Accordingly, this court declines to adopt Defendant's hypertechnical arguments regarding the insufficiency of the charge. See United States v. Becker, 965 F.2d 383, 386 (7th Cir. 1992).

For the reasons stated, Defendant's Motion to Dismiss Count Two (#29) is DENIED.

II. COUNT THREE

In his 28-page Memorandum in Support of his Motion to Dismiss Count Three, Defendant argues that Count Three should be dismissed because it does not clearly and concisely allege the elements of willfulness, substantial tax deficiency and an affirmative act constituting evasion of tax.

In its Response, the Government states that Count Three focuses on an evasion of assessment of

taxes. The Government states that the allegations in Count Three are that Defendant removed his funds from the United States and placed them in an account in Antigua without ever paying taxes on them, that he failed to file a tax return which revealed his earnings for the 1999 tax year, and that [page 9] his actions were done with the purpose of concealing the funds in question from the IRS.

As this court has already discussed, the case law regarding the Government's burden of proof as to the element of willfulness does not support Defendant's argument that willfulness is not adequately alleged, and no allegation of a "substantial" tax deficiency is necessary. Furthermore, this court does not need to consider Defendant's hypertechnical arguments regarding whether any of the acts alleged can be considered an affirmative act of evasion.

Count Three of the superseding indictment alleges that Defendant earned income in 1999 and owed taxes on that income, that he engaged in affirmative acts to evade or attempt to evade assessment of these taxes, and that he acted willfully.

This court therefore concludes that Count Three of the indictment is sufficient to set out the elements of the offense charged and is sufficient to inform Defendant of the offense with which he is charged.

For the reasons stated, Defendant's Motion to Dismiss Count Three (#22) is DENIED.

III. COUNTS FOUR AND FIVE

In his 35-page Memorandum in Support of his Motion to Dismiss Counts Four and Five, Defendant raises numerous questions regarding how the Government can prove wire fraud based upon the allegations contained in the superseding indictment. However, as noted previously, the issue before this court in ruling on the Motion to Dismiss is whether the indictment states the elements of the crime charged, informs the defendant of the nature of the charge so that he may prepare a defense, and enables the defendant to plead the judgment as a bar against future prosecution for the same offense. See Agostino, 132 F.3d at 1189.

In Counts Four and Five of the superseding indictment, Defendant is charged with the offense of wire fraud in violation of 18 U.S.C. § 1343. The

elements of the offense of wire fraud [page 10] are: (1) that the defendant participated in a scheme to defraud; (2) that the defendant intended to defraud; and (3) that a wire communication was used in furtherance of the fraudulent scheme. United States v. Tadros, 310 F.3d 999, 1006 (7th Cir. 2002); see also United States v. Jaffe, ___ F.3d ___, 2004 WL 2423683, at *2 (7th Cir. 2004). A "scheme to defraud" under the wire and mail fraud statutes must include the element of a material falsehood. United States v. Gee, 226 F.3d 885, 891 (7th Cir. 2000), citing Neder v. United States, 527 U.S. 1, 25 (1999). Accordingly, an indictment must allege that the defendant misrepresented or concealed a material fact in aid of the scheme to defraud. See Gee, 226 F.3d at 891.

In Counts Four and Five, the superseding indictment alleges that Defendant "knowingly devised and intended to devise a scheme and artifice to defraud the IRS." The indictment alleges that the purpose of the scheme was to: A. Remove the defendant's liquid funds to a hidden offshore location and thereby conceal them from the IRS so the IRS could not find the funds and seize the funds to

satisfy assessed taxes owed to the United States government, and B. Protect the defendant's personal funds by making it appear that the funds available to him were borrowed funds, and C. Protect the defendant's personal real estate by making it appear that there was an unsatisfied mortgage on his home. In Count Four, the superseding indictment alleges that the scheme to defraud included the wire of approximately $200,000 in funds on October 3, 2000.

In Count Five, the superseding indictment alleges that the scheme to defraud included the wire of approximately $100,000 in funds on October [page 11] 25, 2000. Defendant contends that Counts Four and Five must be dismissed based upon McNally v. United States, 483 U.S. 350 (1987), United States v. Gimbel, 830 F.2d 621 (7th Cir. 1987) and United States v. Eckhardt, 843 F.2d 989 (7th Cir. 1988). In McNally, the United States Supreme Court held the mail fraud statute was "limited in scope to the protection of property rights." McNally, 483 U.S. at 360. Accordingly, the Court held that the mail fraud statute did not prescribe schemes to defraud victims of intangible rights. Gimbel, 830 F.3d at 626, citing McNally, 483 U.S.

at 360.

Following McNally, the Seventh Circuit concluded that the indictment in Gimbel, which accused the defendant of not providing information to Treasury Department officials, was not sufficient to allege mail or wire fraud because it did not allege a scheme to defraud the government of money or property, even though the Department may have assessed a tax deficiency had the information been disclosed. Gimbel, 830 F.2d at 627. In Eckhardt, the Seventh Circuit stated that a charge of wire fraud which alleged that the defendant interfered with the IRS's proper ascertainment and collection of income taxes was not sufficient because the indictment did not specifically allege that the defendant deprived the Government of revenue. Eckhardt, 843 F.2d at 996-97.

This court concludes that Defendant's argument must fail for two reasons. First, on November 18, 1988, Congress enacted 18 U.S.C. § 1346 which stated that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. §

1346. Therefore, McNally has been superseded by Congress. See United States v. Bush, 888 F.2d 1145 (7th Cir. 1989). Accordingly, the holdings in McNally, Gimbel, and Eckhardt that Defendant relies on have questionable validity. Second, and most important, this court [page 12] agrees with the Government that the allegations included in the indictment in this case are sufficient to allege that the IRS had a property interest in the taxes owed by Defendant. This court therefore concludes that there is no reason to dismiss the indictment based upon McNally, Gimbel, and Eckhardt.

Defendant has raised numerous other impassioned arguments that the facts do not show a fraud or a material concealment. This court notes that "[i]n construing an indictment under the mail fraud statute, a broad rather than a technical standard should be used to determine the sufficiency of the allegation of fraud." United States v. Brack, 747 F.2d 1142, 1147 (7th Cir. 1984); United States v. Mosky, 1990 WL 37106, at *2 (N.D. Ill. 1990). Further, "an indictment setting out the mailings charged and alleging that they were in furtherance of the scheme should not be

dismissed as insufficient on its face unless there is no conceivable evidence that the government could produce at trial to substantiate its 'in furtherance' allegation." United States v. Castor, 558 F.2d 379, 385 (7th Cir. 1977); Mosky, 1990 WL 37106, at *2. The Seventh Circuit has consistently held that cases construing the mail fraud statute are applicable to the wire fraud statute. See Gimbel, 830 F.2d at 627; United States v. Feldman, 711 F.2d 758, 763 n.1 (7th Cir. 1983). This court has carefully considered the allegations included in Counts Four and Five of the superseding indictment.

Based upon the applicable case law, this court must conclude that the allegations in Counts Four and Five are sufficient to allege the offenses charged. For the reasons stated, Defendant's Motion to Dismiss Counts Four and Five (#24) is DENIED.

IV. COUNTS SIX AND SEVEN

In his 19-page Memorandum in Support of his Motion to Dismiss Counts Six and Seven, [page 13] Defendant argues that both counts should be dismissed because the superseding indictment does not sufficiently allege money laundering because

there are no allegations that the "proceeds" were derived from illegal activity. Defendant relies, in part, on his previous claims that Counts Two, Four and Five are insufficient to state an offense. These arguments have already been rejected by this court.

Count Six alleges that Defendant committed money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). The elements of a money laundering offense under this statute are: (1) the defendant knowingly conducted a financial transaction with property representing the proceeds of some illegal activity; (2) the defendant knew that the property involved in the transaction was illegally derived; and (3) the defendant knew that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds. See United States v. Esterman, 324 F.3d 565, 569 (7th Cir. 2003); United States v. Gabel, 85 F.3d 1217, 1223 (7th Cir. 1996). Both distinct transactions and deliberate concealment must be shown to support a money laundering conviction under this section. Esterman, 324 F.3d at 571.

Count Seven alleges that Defendant committed money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(ii). The elements of an offense under § 1956(a)(1)(A)(ii) are: (1) the defendant knowingly conducted a financial transaction with property representing the proceeds of some illegal activity; (2) the defendant knew the property represented illegal proceeds; and (3) the defendant conducted the transaction with the intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code. 26 U.S.C. § 1956(a)(1)(A)(ii); see also United States v. Masten, 170 F.3d 790, 797 (7th Cir. 1999).

The Government argues that the superseding indictment clearly alleges that Defendant [page 14] conducted financial transactions with proceeds of the illegal activity of wire fraud, as set forth in Counts Four and Five. The transfer of the proceeds of wire fraud can constitute money laundering. See United States v. Seward, 272 F.3d 831, 836-37 (7th Cir. 2001). In Count Six, the superseding indictment alleges that Defendant transferred the proceeds of the wire fraud in order to conceal the funds from the IRS and yet

make the funds available to Defendant for use at his direction.

In Count Seven, the superseding indictment alleges that Defendant transferred the proceeds of the wire fraud with the intent to engage in conduct constituting the evasion of payment of taxes in violation of § 7201 of the Internal Revenue Code.

This court notes that, in order to obtain a conviction on these money laundering charges, the Government will need to prove distinct transactions. See Esterman, 324 F.3d at 571. "The transaction or transactions that created the criminally-derived proceeds must be distinct from the money-laundering transaction, because the money laundering statutes criminalize 'transaction[s] in proceeds, not the transaction[s] that create[] the proceeds.'" Seward, 272 F.3d at 836, quoting United States v. Mankarious, 151 F.3d 694, 705 (7th Cir. 1998). However, this court concludes that the superseding indictment is sufficient to set out the elements of the offenses charged.

For the reasons stated, Defendant's Motion to Dismiss Counts Six and Seven (#26) is DENIED.

IT IS THEREFORE ORDERED THAT:

(1) Defendant's Motion to Dismiss Count Two (#29) is DENIED. (2) Defendant's Motion to Dismiss Count Three (#22) is DENIED. (3) Defendant's Motion to Dismiss Counts Four and Five (#24) is DENIED. (4) Defendant's Motion to Dismiss Counts Six and Seven (#26) is DENIED. [page 15] (5) On November 2, 2004, Defendant filed a Motion to Dismiss Counts One through Seven for Perjury and Prosecutorial Misconduct before Grand Jury (#33) and a Memorandum in Support (#34). Because of the very serious nature of the charges made in Defendant's Motion, this court has allowed the Government until December 3, 2004, to file its Response. A hearing has been scheduled for December 8, 2004, at 10:30 a.m. for argument or ruling on Defendant's Motion to Dismiss (#33).

ENTERED this 10th day of November, 2004
s/ Michael P. McCuskey
MICHAEL P. McCUSKEY
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

Filed 7-22-05

UNITED STATES OF AMERICA,
Plaintiff,

v. **Case No. 04-CR-20031**

DENNY R. PATRIDGE,
Defendant.

ORDER

A jury trial commenced in this case on June 13, 2005. On June 30, 2005, the jury returned a verdict and found Defendant, Denny R. Patridge, not guilty of the offense charged in Count 1 of the Superseding Indictment and guilty of the offenses charged in Counts 2, 3, 4, 5, 6, and 7 of the Superseding Indictment. On July 12, 2005, Defendant filed a "Motion for Order of Dismissal of Indictment in Counts 2, 3, 4, 5, 6, and 7 Pursuant to 26 U.S.C. § 7201 for Violating Constitution, and in the Alternative, Motion for Judgment of Acquittal, and in the Alternative, to set aside the Verdict as to Counts 2, 3, 4, 5, 6, and 7 for Insufficient Evidence, and in the Alternative, Motion for Order of New Trial, and Finally, for Order Dismissal of Indictment and Verdict Upon Rule of

Lenity Grounds" (#154). In support of his Motion, Defendant filed a 48-page Memorandum (#155).

This court first notes that the Memorandum filed by Defendant includes lengthy, rambling arguments. Many of these arguments are the same as, or at least very similar to, arguments already raised by Defendant and rejected by this court in ruling on Defendant's numerous pre-trial motions to dismiss. This court further notes that Defendant spends many pages of the Memorandum discussing the question the jury had during its deliberations and this court's response to the question.

This court notes that Defendant did not object when the court informed him of the answer it intended to give to the jury, which included definitions from Black's Law Dictionary, Seventh Edition. In addition, Defendant did not propose any alternate response. Therefore, to the extent that Defendant is arguing that this court erred in its response to the jury's question (which is difficult to discern from the rambling, stream-of-consciousness argument presented), that argument is clearly waived.

As far as Defendant's remaining arguments, this court concludes: (1) that the Superseding Indictment in this case was sufficient and did not violate the Constitution; (2) the evidence presented at trial was clearly sufficient to support the jury's determination that Defendant is guilty of Counts 2, 3, 4, 5, 6, and 7 of the Superseding Indictment; (3) the jury was properly instructed in this case and there is no basis for a new trial; and (4) the "rule of lenity" has no application in this case.

IT IS THEREFORE ORDERED THAT:

(1) Defendant's post-trial Motion (#154) is DENIED.

(2) This case remains scheduled for a sentencing hearing on November 21, 2005, at 10:00 a.m. ENTERED this 22nd day of July, 2005

s/ Michael P. McCuskey
MICHAEL P. McCUSKEY
CHIEF U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v. **Case No. 04-CR-20031)**
DENNY R. PATRIDGE,
Defendant.

ORDER

On June 30, 2005, following a jury trial, Defendant, Denny R. Patridge, was found guilty of two counts of tax evasion, two counts of wire fraud and two counts of money laundering. Defendant was found not guilty of one count of filing a false tax return. This court entered a judgment of conviction as to Counts 2-7 and scheduled a sentencing hearing on November 21, 2005. The sentencing hearing was continued and scheduled on April 24 and 25, 2006, continued again and scheduled for May 8 and 9, 2006, and continued again and scheduled for September 25, 26, and the morning of September 27, if necessary.

On August 18, 2006, Defendant filed a Motion to Continue Sentencing Hearing (#176). Defendant noted that one of the main issues at sentencing will

be the calculation of tax loss attributable to Defendant. Defendant stated that there were civil proceedings pending concerning the Civil Due Process hearing, which are scheduled for oral argument before the Seventh Circuit on October 4, 2006, and also tax court proceedings pending. Defendant stated that Probation Officer Vincent P. Kistner suggested that a continuance would be appropriate considering all the various actions and hearings that are taking place in the near future in these other cases. Defendant asked [page 2]for a four-month continuance of the sentencing hearing in this case.

On August 23, 2006, this court entered a text order which set a hearing on the Motion to Continue and directed the Government to respond to the Motion to Continue. On August 30, 2006, the Government filed its Response (#177). The Government stated it was informed by Probation Officer Kistner that he did not "suggest" a continuance but merely inquired whether Defendant intended to request a continuance. The Government also noted that Defendant did not explain why his

pursuit of a civil remedy should result in a continuance of his criminal sentencing. The Government requested that Defendant's Motion to Continue be denied.

This court notes that the oral argument referred to by Defendant is scheduled in Defendant's appeal of a decision by United States District Judge Jeanne E. Scott in Case No. 05-CV-3249. In that case, Defendant and his wife, Judy Patridge, sued the Internal Revenue Service and Revenue Officers Curtis Medyesi and Debra Dufek. They sought a redetermination by the district court of "each and every issue raised by Plaintiffs herein and in the Request for Collection Due Process Hearing regarding the validity of the whipsaw tax and double tax assessments issued on January 27, 2000 for years 1996 and 1997." On December 23, 2005, Judge Scott entered an Opinion (#12) which dismissed the case. Judge Scott found that income tax liability falls within the jurisdiction of the tax court. Judge Scott therefore found that the Plaintiffs failed to meet their burden of identifying a statute waiving the United States' sovereign immunity under the circumstances of this

case and therefore concluded that the court lacked subject matter jurisdiction.

It is this Opinion which has been appealed and is scheduled for limited oral argument of 10 minutes per side on October 4, 2006, at 9:30 a.m. before the Seventh Circuit Court of Appeals.

On August 30, 2006, Defendant filed a Motion to Compel Discovery (#178), with a [page 3] Memorandum in Support (#179), a Motion to Continue the Time to Object to the Presentence Report (#180), and a Motion to Dismiss Superseding Indictment (#181) with a Memorandum in Support (#182). Defendant has also filed a Notice (#183) with attached exhibits in support of his Motion to Dismiss. In his Motion to Compel Discovery, Defendant sought an order directing the Government to turn over to Defendant the information the Government turned over to the Probation Office regarding the proposed tax loss calculations submitted by the Probation Office.

In his Motion for Extension of Time, Defendant stated that he needed that information before he could file proper objections to the Presentence

Report. In his Motion to Dismiss, Defendant sought dismissal of the Superseding Indictment based upon "the recent revelation by Prosecution that this Court was the complainant against Defense witness Brent Winters prior to July 9, 2002 and that this Court refused to allow Mr. Winters to testify because of that investigation began at the request of this Court." On August 31, 2006, this court entered a text order directing the Government to file a Response to Defendant's Motions by September 5, 2006, and which stated that all pending motions would be heard at the motion hearing scheduled for September 6, 2006, at 4:00 p.m.

On September 5, 2006, the Government filed its Response to Defendant's Motions (#184). Regarding the Motion to Dismiss, the Government noted that this court has already denied numerous Motions to Dismiss the Superseding Indictment. The Government noted that Defendant has already been convicted and cites no case law to support his position that an indictment can be dismissed following conviction. The Government stated that Defendant "now has other avenues by which to file his criticism of the charges

and proof." Regarding the Motion to Compel Discovery, the Government stated that Defendant "has had access to all documents on which the government bases its loss analysis.

The government's tax loss figure is simply an analysis of the documents previously [page 4] produced. Should the defendant wish to submit his own analysis of loss based upon the records, the Court will, no doubt, consider the defendant's figures." As far as the Motion for Extension of Time, the Government noted that Defendant has not identified any objections for which he requires additional time. The Government additionally stated that, in the tax court case referred to by Defendant, the tax court granted summary judgment in favor of the respondent, the Internal Revenue Service (IRS).

The Government attached a copy of the tax court decision, dated August 28, 2006. In this decision, the tax court noted that Petitioners (Denny and Judy Patridge) "again make their whipsaw and double tax argument, as well as assert violations of the Paperwork Reduction Act of 1995 and the lack of authority of respondent's employees to act in this

case." In ruling in favor of the IRS, the tax court specifically stated that the forms submitted "show that respondent did not make any duplicate collection with respect to petitioners' trusts." The tax court stated that the IRS may proceed with collection for taxable years 1996 and 1997.

On September 5, 2006, Defendant filed a Motion to Dismiss Involving Government's Failure to Prove Defendant was Aware of 26 U.S.C. § 7201 as Required by Supreme Court holding Bryan v. United States, 524 U.S. 184, 194 (1998) (#185) and Memorandum in Support (#186) and a Motion to Dismiss Regarding Violations of the Paperwork Reduction Act of 1995 (#187) and a Memorandum in Support (#188) with numerous lengthy exhibits.

This court concludes that Defendant has not shown any basis for dismissing the indictment against him at this late dat following conviction and just prior to sentencing. Any errors Defendant perceives in the way the trial was handled or any perceived insufficiency of evidence may be raised on appeal to the Seventh Circuit Court of Appeals.

As far as Brent Winters' failure to testify in this

case, this court's recollection is that it allowed Mr. Winters to assert his Fifth Amendment privilege [page 5] against self-incrimination. This court notes that the Seventh Circuit has stated that "[m]any cases hold that the sixth amendment does not entitle a defendant to testimony that the witness has a fifth amendment privilege not to give." Liegakos v. Cooke, 106 F.3d 1381, 1387 (7th Cir. 1997).

Accordingly, when a potential witness indicates that he will likely invoke his privilege against self incrimination, the district court should ensure that the witness cannot possibly incriminate himself. United States v. Mabrook, 301 F.3d 503, 506 (7th Cir. 2002). If a witness's testimony may make him vulnerable to prosecution, the trial court may allow him to invoke his privilege and refuse to testify. Mabrook, 301 F.3d at 506. In addition, a defendant is not allowed to call a witness for the purpose of having the witness assert his Fifth Amendment privilege. Mabrook, 301 F.3d at 507.

Therefore, this court believes that its ruling regarding Mr. Winters was consistent with the applicable case law and perfectly proper. Thus, Defendant's Motions to Dismiss (#181, #185, #187) are

DENIED.

Moreover, Defendant has not shown any legitimate basis for continuing the sentencing hearing in this case. Defendant has not shown that the pending civil litigation has any bearing on the tax loss calculation that this court must determine at sentencing. This is especially true now that the tax court has ruled against Defendant. In addition, the underlying documents relied upon by the Probation Office in making its recommended tax loss calculations have been made available to Defendant.

Therefore, Defendant's Motion to Continue Sentencing Hearing (#176), Motion to Compel Discovery (#178), and Motion for Extension/Continuance of Time for Objection to Presentence Report (#180) are DENIED. [page 6]

IT IS THEREFORE ORDERED THAT:

(1) Defendant's Motions to Dismiss (#181, #185, #187) are DENIED. (2) Defendant's Motion to Continue Sentencing Hearing (#176), Motion to Compel Discovery (#178), and Motion for Extension/Continuance of Time for Objection to

Presentence Report (#180) are DENIED. ENTERED this 7th day of September, 2006

s/ Michael P. McCuskey
MICHAEL P. McCUSKEY
CHIEF U.S. DISTRICT JUDGE